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No. 254

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN E. ACUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILL WILSON,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to June 20, 1969, and the petition was filed on June

18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the jurors to separate after they had commenced their deliberation.

2. Whether it was proper to permit impeachment of petitioner's testimony upon direct examination that he had never been connected with counterfeiting.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner and co-defendant Pruett were convicted of conspiracy to sell, transfer and deliver counterfeit currency, in violation of 18 U.S.C. 371 and 473. Petitioner was sentenced to imprisonment for thirty months (R. 1, 19).[1] The court of appeals affirmed.

1. In July 1967, a Secret Service agent, pretending to be a dealer in "pep" pills, talked with petitioner in Jasper, Tennessee, about setting up an illicit still on petitioner's premises. Petitioner asked the agent whether he would be interested in buying counterfeit currency. The agent indicated that he would and petitioner named a price (Tr. 52-59).

[1] A second count against petitioner alone, charging possession of counterfeit currency, was severed by the court before trial (Tr. 340). Another co-defendant, Mayes, was not tried, having been taken into custody as a fugitive on a State charge (Tr. 95).

After several abortive meetings, petitioner said that his source, a person named "Eddie", could be contacted by calling a telephone number written on a yellow slip of paper, which he gave the agent (Tr. 60-75; Govt. Exh. 1). Calls to this number resulted finally in a return call by a person identifying himself as Eddie, who agreed to meet the agent. At this meeting, co-defendant Charles Edward Pruett appeared, said that he had been in touch with petitioner, and offered to sell counterfeit $10 and $20 bills at the price which petitioner had quoted (Tr. 75-80). Pruett and co-defendant Mayes later met with the Secret Service agent and a second agent. Pruett exhibited samples of the counterfeit currency which he was offering to sell (Tr. 84-92; 174-175). When he and co-defendant Mayes later made delivery, they were arrested and the counterfeit money seized (Tr. 95; 181-184).

Petitioner, testifying in his own behalf on direct examination, stated that he had never been connected with the counterfeiting business (Tr. 240). On cross-examination, he testified that Herman Newman was a friend but he had never shown Newman any counterfeit bills, and that he knew Donald Harris but that Harris had never helped him count counterfeit $20 bills. Over petitioner's objection, this questioning was permitted solely for its possible bearing on his credibility. (Tr. 265-269). On rebuttal, the government was permitted to introduce testimony, for the same limited purpose, by the two parties referred to previously. Harris stated that he had helped petitioner count $20,000 in counterfeit $20

bills and had received two of these bills, which were admitted in evidence (Tr. 274-282). Newman testified that he had seen several stacks of bills on petitioner's desk, covered by a piece of canvas. They were wrapped, but not in the manner bills were wrapped at the bank; a larger number of bills were enclosed by the wrappers, which were of a different color than those used at the bank. Petitioner gave him a bill, which was stiffer than an ordinary bill and which would "rattle" when it was bent (Tr. 287-291).

2. At the conclusion of the two-day trial, the court told the jurors that they ought to deliberate for a reasonable time that evening (Tr. 297). After charging the jury, the court said that it would let them determine how long they would deliberate that evening. One of the jurors asked if they might come back the following day, which was Saturday. The court said that would be desirable, but if it presented any problems to the jurors, they might have to wait until Monday. When the jury had retired, petitioner objected to an overnight respite, the stated reason being the notoriety of the case (Tr. 328-329). At 10:15 p.m., the jury said, in response to an inquiry by the court, that it wished to continue deliberating (Tr. 331-332). At 11:00 p.m., the jury requested a recess until Monday. The court ordered a recess until 9:00 o'clock on Monday morning. The jurors were told to bear in mind all of the court's instructions not to discuss the case, not to allow any one to talk with them and not to listen to or read news accounts about the case. Petitioner's attorney indicated that

he wished to take up something with the court, but said that he would wait until the jury was out. After the jury had left, objection was made for both defendants that, because of the notoriety of the case, it would be impossible for the jury not to be contaminated in some way by the separation, especially since it would run from Friday evening until Monday morning (Tr. 332-335). The jury reconvened at 9:00 a.m. on the following Monday and returned a verdict of guilty at 11:18 a.m. (Tr. 337-339).

ARGUMENT

1. It was not improper to comply with the wishes of the jurors to disperse over the weekend, even though they had commenced their deliberation. As his reason for claiming that this was prejudicial, petitioner says that there was extensive publicity about the case. Before dismissing the jury, however, the court gave an emphatic warning to the jury not to listen to or read anything about the case over the weekend. There is no claim that they disregarded this admonition, or that anyone contacted a juror personally. By contrast, in *Holt* v. *United States*, 218 U.S. 245, 250-251, it was conceded for the purpose of ruling on a defense motion that the jurors had read newspaper accounts of the pending trial. Nonetheless, this Court held, per Mr. Justice Holmes, that the mere opportunity for prejudice raised no presumption that it existed and that the circumstances there failed to show an abuse of the trial court's discretion.

Petitioner, relying on *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), and *United States* v. *D'Antonio*, 342 F.2d 667 (C.A. 7), urges that after a case has been submitted to the jury, separation should never be permitted. While broad language in this regard was used by the Seventh Circuit in these two cases, the particular facts in each would amply support the court's ruling in any event. The court in *D'Antonio* stressed the fact that the trial judge delegated his duty of cautioning the jury to a marshal, and the record did not even show whether he had executed his instructions. In *Panczko* the court was particularly concerned with the difficulties and hardships to which the jurors were subjected—reaching their homes by train and other means of transportation at a late hour of the night. Special conditions may exist which call for caution, and the Court of Appeals for the Seventh Circuit may feel that a rigid rule is beneficial in that circuit. Other circuits can properly leave more discretion to trial judges, and that is precisely what they have done. For example, in reviewing the two Seventh Circuit cases, the Court of Appeals for the Fifth Circuit was of opinion that no reason existed to fashion an inflexible rule or to freeze the somewhat divergent practices under different circumstances into a rigid uniformity. *Tyler* v. *United States*, 397 F.2d 565, 567, 569 (C.A. 5), certiorari denied, 394 U.S. 917. See also *United States* v. *Breland*, 376 F.2d 721, 723-724 (C.A. 2); *Cardarella* v. *United States*, 375 F.2d 222, 227-229 (C.A. 8), certiorari denied, 389 U.S. 882; *Grant* v.

United States, 368 F.2d 658 (C.A. 5); *Hines* v. *United States*, 365 F.2d 649 (C.A. 10); *Roth* v. *United States*, 339 F.2d 863, 866 (C.A. 10).

In the instant case, the convenience and wishes of the jurors provided the basis for the trial court's procedure. Full opportunity was offered them to give deliberate consideration to the case, free from the subtle coercion of being forced to stay together until they had reached a verdict. Nothing in the record gives substance to a belief that they disregarded the court's admonition or that they changed their minds in the interim during which they were separated. They returned Monday morning fresh and, without compulsion of any kind, reached agreement some two hours later. Neither the facts of the particular case nor the claimed superiority of a rigid rule governing all situations suggests the necessity, or indeed the desirability, of further review by this Court.

2. Petitioner's entire argument that evidence of other dealings in counterfeiting was erroneously admitted is based upon the false premise that it was admitted to contradict petitioner's testimony on cross-examination (Pet. 10). On the contrary, it was petitioner himself who opened the door to this evidence by his false testimony on direct examination that he was never connected with the counterfeiting business in any way (*supra*, p. 3). The testimony of Newman and Harris was thus properly admitted for the purpose of impeaching petitioner's credibility. *Mich-*

elson v. *United States*, 335 U.S. 469, 479; *Walder* v. *United States*, 347 U.S. 62.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1969.

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[2] In addition, since knowledge of the counterfeit character of the currency involved is an essential element of the crime charged (see *Rood* v. *United States*, 340 F.2d 506 (C.A. 8), certiorari denied, 381 U.S. 906; *Paz* v. *United States*, 387 F.2d 428 (C.A. 5)), evidence of petitioner's prior dealings in counterfeit money was admissible in order to prove such knowledge (see *United States* v. *Carlson*, 359 F.2d 592 (C.A. 3); *United States* v. *Kelley*, 186 F.2d 598 (C.A. 7), certiorari denied, 341 U.S. 954).

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